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80-1902

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HARALD SCHLEIFFER, a minor, by next of friend Ann Ker,
Petitioner,

vs

EDWARD J. MEYERS, as Judge of the Whitley Circuit Court, Whitley County, Indiana,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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I
QUESTIONS PRESENTED FOR REVIEW

The question presented for review is whether a state court order removing a minor citizen from the United States against his will and without any hearing on what is in the child's best interests is a violation of the citizen child's constitutional rights. The constitutional questions are whether the state court order constitutes an abridgment of the privileges and immunities of a citizen of the United States under Article IV, Section 2 and the 14th Amendment, Section 1; a denial of equal protection of the law under the 14th Amendment, Section 1; and a deprivation of liberty without due process of law under the 5th Amendment and the 14th Amendment, Section 1. There is also raised the constitutional issue as to whether the state court order constitutes a deportation order which is a matter within the exclusive jurisdiction of the United States under Article I, Section 8, Clause 10 and therefore an unreasonable seizure of the person in violation of the 4th Amendment. A subsidiary constitutional question has been raised as to whether the state trial court should have

appointed independent legal counsel to represent the interest of the child in that proceeding pursuant to the due process provisions of the 5th and 14th Amendments.

The state trial court entered its orders of removal on July 1, 1980 and July 21, 1980 (A 48-56 and A 57-58). The minor citizen, by next of friend, thereafter on August 1, 1980 filed his petition for a Writ of Prohibition against the state court order in the United States District Court for Northern Indiana pursuant to the Civil Rights Act of 1871, 42 U.S.C. §1983 (A 37-58). On August 11, 1980 the U.S. District Court found that there was no violation of the minor citizen's civil rights and dismissed the petition for failure to state a claim upon which relief may be granted (A 24-36). The United States Court of Appeals for the Seventh Circuit, after granting a temporary injunction pending appeal (A 22-23), sustained the dismissal of the U.S. District Court on March 16, 1981.

II
LISTING OF PARTIES

A. Harald Schleiffer, a minor citizen, by next of friend Ann Ker and represented

by attorney Donald D. Doxsee, 323 West Berry Street, Fort Wayne, Indiana 46802.

B. The Honorable Edward J. Meyers, as Judge of the Whitley Circuit Court of Whitley County, Indiana and represented by the attorney for the minor citizen's mother John S. Bloom, 111 West Market Street, Columbia City, Indiana 46725. The Attorney General of Indiana was served with notice of original action in federal court and with the notice and brief on appeal. However, he chooses not to appear and defend the judge.

C. Hjordis Schleiffer, mother of the minor citizen, and represented in the state trial court by attorney John S. Bloom named in item B. above and was served with notice of the original action in federal court.

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V

OFFICIAL AND UNOFFICIAL REPORTS

The case below has not yet been published in any official or unofficial reporter.

VI
JURISDICTION

This Petition for Writ of Certiorari is filed in this court pursuant to the jurisdiction granted this court by 28 U.S.C. §1254 to review a decision of the United States Court of Appeals for the Seventh Circuit rendered in this cause on March 16, 1981. A copy of the Court of Appeals decision is found at A 1-21. This petition has been filed within the time prescribed by Supreme Court Rule 20 and 28 U.S.C. §2101. The case was originally filed in the United States District Court for the Northern District of Indiana pursuant to the Civil Rights Act of 1871, 42 U.S.C. §1983.

VII
CONSTITUTIONAL PROVISIONS AND RELEVANT STATUTES

A. Constitution of the United States

1. Article I, Section 8, Clause 10 dealing with the exclusive power of Congress on naturalization and by implication deportation:

> Article I, Section 8. The Congress shall have the power . . . . To establish an uniform

Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . . .

2. Article IV, Section 2, Clause 1 dealing with privileges and immunities of citizens:

> Section 2. The Citizens of each State shall be entitled to all Privileges and immunities of Citizens in the several States.

3. The 4th Amendment dealing with the right to be secure in one's person from unreasonable seizures:

> 4th Amendment. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

4. The 5th Amendment which prohibits the taking of liberty without due process of law:

5th Amendment. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danager; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

5. The 14th Amendment, Section 1 dealing with the privileges or immunities of citizens, the taking of liberty without due process of law, and the right to equal protection of the law:

14th Amendment, Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens

of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. Statutes

This action was originally brought in the United States District Court for the Northern District of Indiana pursuant to 42 U.S.C. §1983 and commonly known as the Civil Rights Act of 1871 as amended:

> 42 U.S.C. §1983. Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of

Columbia. (R.S. §1979 as amended by Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284).

VIII
STATEMENT OF THE CASE AND FACTS

1. The minor citizen petitioner was born in Sweden on July 17, 1970 of a U.S. father and a Norweign mother (now a Swedish citizen). The child is now 10 years of age. He was certified a U.S. citizen by the U.S. State Department on May 11, 1971 by reason of both parents registering the child's birth with the U.S. Consulate in Sweden. The U.S. District Court in its opinion (Appendix page A-26) erroneously states that the birth was not registered until October 25, 1978. The 1978 date is the date of the certification of the birth certificate copy attached to the petition in the original action (A-47).

2. On December 18, 1977 the minor citizen petitioner's parents filed an action in the Swedish courts which resulted in their divorce (A-51, Item 14).

3. In August of 1978 the father took the minor citizen petitioner to the United States. (A-51, Item 12).

4. On February 12, 1979 the Swedish court divorced the parents and awarded

custody of the minor child petitioner to the Swedish mother. (A-52, Item 16)

5. On June 15, 1979 the father filed a petition for custody of the minor citizen petitioner in the Whitley Circuit Court of Whitley County, Indiana under the Uniform Child Custody Act, Indiana Code 31-1-11.6. (A-53, Item 17).

6. On July 1, 1980, the Whitley Circuit Court denied the father's petition for custody on jurisdictional grounds only and without a hearing on the best interests of the minor citizen petitioner and ordered that the minor citizen appellant be placed in the custody of the mother, a citizen and resident of Sweden. (A 48-56).

7. On July 21, 1980 the father filed a petition for a suspension of the enforcement of the state court judgment pending appeal to the Indiana Court of Appeals. However, the Whitley Circuit Court stayed only the payment of the mother's attorney fees and travel expenses, subject to filing an appeal bond of $3,000.00, and ordered the father to return the minor citizen petitioner to the mother in Sweden on or before July 28, 1980. (A 57-58).

8. On August 1, 1980 the minor citizen petitioner, by next of friend, filed

his petition in the United States District Court for the Northern District of Indiana praying for the issuance of a Writ of Prohibition against the enforcement of the state court order removing him from the United States pursuant to the Civil Rights Act of 1871, 42 U.S.C. §1983. (A 37-58).

9. On August 11, 1980 the United States District Court, without notice or hearing, summarily dismissed the minor ~~citizen~~ petitioner's petition for the Writ of Prohibition against the state court order on the grounds that there was no violation of the minor citizen petitioner's civil rights and therefore a failure to state a claim upon which relief may be granted. (A 24-36).

10. On August 29, 1980 the minor citizen petitioner filed his notice of appeal of the U.S. District Court decision which was then docketed in the United States Court of Appeals for the Seventh Circuit on September 3, 1980.

11. On November 3, 1980 the United States Court of Appeals for the Seventh Circuit granted a temporary injunction against the enforcement of the state court order insofar as it applied to the

removal of the minor citizen appellant from the United States pending the appeal. (A 22-23).

12. The case was duly briefed and argued before the United States Court of Appeals for the Seventh Circuit on December 1, 1980 and the court rendered its decision on March 16, 1981 sustaining the dismissal by the U.S. District Court for the Northern District of Indiana. (A 1-21).

13. On March 26, 1981 immediately after the docketing of the state court appeal by the father and pursuant to a suggestion in oral argument by the judges of the U.S. Court of Appeals, the minor citizen petitioner filed a petition to intervene in the Indiana Court of Appeals to present the matters here in issue and to secure a stay of the state trial court's order of removal. That petition to intervene and the request for a stay was denied by the Indiana Court of Appeals after a hearing and argument on April 9, 1981. (A-59).

14. On April 23, 1981 the United States Court of Appeals for the Seventh Circuit denied the minor citizen petitioner's motion for a stay of the mandate of the U.S. Circuit Court of Appeals. (A 60-61).

15. The petitioner now files this petition for Writ of Certiorari.

16. The minor citizen petitioner's attorney has not represented the father in this or any other court proceeding.

17. Except for the petition to intervene in the Indiana Court of Appeals (which petition was denied), the minor citizen petitioner was not represented by counsel in any of the state court proceedings.

IX
ARGUMENT

A. Issues Presented and Remedy Sought

The basic issue which the minor citizen petitioner asks this court to review by Writ of Certiorari is whether or not a state court may order his removal from the United States against his will without first holding a hearing to determine whether such removal is in his best interest. The remedy sought by the minor citizen petitioner is the issuance of a Writ of Prohibition by ~~a federal court pursuant~~ to the Civil Rights Act of 1871, 42 U.S.C. §1983, against the enforcement of the state court order until such time as the state court holds a "best interest" hearing. The petitioner does not seek to involve the federal courts in domestic relations matters. He does, however, ask the federal court to require that the state courts protect his Constitutional Rights.

The constitutional questions are whether the state court order constitutes an abridgment of the privileges and immunities of a citizen of the United States under Article IV, Section 2 and the 14th Amendment, Section 1; a denial of equal protection of the law under the 14th Amendment, Section 1; a deprivation

of liberty without due process of law under the 5th Amendment and the 14th Amendment, Section 1; a deportation order within the exclusive jurisdiction of the United States under Article I, Section 8, Clause 10; and an unreasonable seizure of the person in violation of the 4th Amendment. The subsidiary constitutional question of independent legal counsel for the minor citizen is presented under the due process provisions of the 5th and 14th Amendments.

It is an unchallenged principle of constitutional law that an adult citizen may not be deported or otherwise removed from the United States against his will (one possible exception might be a removal pursuant to a valid extradition treaty). Counsel can find no cases in which a citizen has been so deported or removed. In the case of United States v. Valentine, 288 F.Supp. 957 (D.P.R. 1968) at page 957 the court stated "The only absolute and unqualified right of citizenship is to residence within the territorial boundaries of the United States; a citizen cannot be either deported or denied re-entry."

Your minor citizen appellant believes that this is one of those fundamental constitutional rights which extends to minors as well as adults. It is the natural extension of In re Gault, 387 U.S. 1 (1967) and its progeny. In that case this Court stated that "(N)either the Fourteenth Amendment nor the Bill of Rights is for adults alone." Should this court grant the Writ of Certiorari there is included in this question the issue of the extent to which the state trial court should consider the wishes of the minor child and the issue as to whether the minor child should be represented by independent legal counsel. The Bergstrom case discussed below includes a discussion of the issue of the wishes of the minor child and the case of Johns v. Department of Justice of U.S., 624 F.2d 522 (5th Cir. 1980) deals with the required appointment of counsel for a minor child.

B. Constitutional Question Not Previously Decided

As one of the reasons the Court should grant the Writ of Certiorari pursuant to Supreme Court Rule 17 is that this case presents a constitutional question which has not been previously

decided by this court, but should be settled by this court. Counsel can find no Supreme Court precedents which settle the issues here presented. With the increasing international mobility of our population, more and more cases of this nature are being presented to state trial courts. It is important that constitutional guidelines be layed down to protect the rights of minor citizens.

C. Conflicting Federal Decisions

An additional reason for this Court granting the Writ of Certiorari is that there are conflicting decisions of federal courts on the issues here presented. In direct conflict with the decision of the United States Court of Appeals for the Seventh Circuit here being appealed is the decision of the United States District Court for North Dakota (Southwestern Division) in the case of Bergstrom v. Bergstrom, 478 F.Supp. 434 (D.C.N.D. 1979). That case strongly supports the position of the petitioner herein. The Bergstrom case was reversed on appeal to the United States Court of Appeals for the Eighth Circuit, Bergstrom v. Bergstrom, 623 F.2d 517 (8th Cir. 1980). However, it should be noted that the 8th Circuit reversed and

ordered dismissal because it felt that the matter was not yet "ripe" for a determination by the federal courts. It did not reverse the constitutional holdings of the U.S. District Court. The 8th Circuit Court of Appeals noted that state court proceedings were still pending and that the minor child was represented by independent legal counsel in the state court proceedings. The Supreme Court of North Dakota has since ruled in the case of Bergstrom v. Bergstrom, 296 N.W.2d 490 (1980) by prohibiting the removal of the minor child from the United States. However, the North Dakota Supreme Court avoided the constitutional issues.

The Bergstrom case is very similar to the case here at issue. It involved a minor citizen petitioning the United States District Court for North Dakota for an injunction against the enforcement of a custody order from the Superior Court of the District of Columbia requiring the removal of the minor citizen to the custody of her mother who was a resident and citizen of Norway. The child in the Bergstrom case was born of a U.S. father in the country of Ethiopia and was at the time of the federal court action 8 years

of age. An action was also brought in the state court of North Dakota which held that the Uniform Child Custody Act was not applicable and the state court refused to take any custody action except to order the return of the child to the mother in Norway.

The U.S. District Court in the Bergstrom case found that the state court removal order violated the minor citizen's Fifth Amendment rights and issued an order restraining the enforcement of the state court order removing the minor citizen from the United States. The U.S. District Court went on to hold that where a minor citizen is of sufficient age, discretion and intelligence to state her preference apart from the preference of either her mother or father, then the court should give force to that preference. The U.S. District Court felt that its decision was a logical extension of In re Gault, supra, and went on to hold at page 440-441:

> This court has been shown no laws, statutes or holdings which would authorize a court of domestic relations to remove a minor American citizen from the protection of the Constitution and laws of the United

> States against her will. Regardless of the ability of the then seven year old Ida to state a preference as to her residence at the time of the Superior Court's decree, the doctrine of "best interests" cannot be extended to deprive Ida of her intelligently asserted preference as an American citizen to remain in this country. By enforcing and abiding by the custody award of the Superior Court, and in so doing invoking the full power and authority of the District of Columbia, Alan and Astrid Bergstrom have also violated Ida Marie Bergstrom's right to liberty without due process guaranteed by the Fifth Amendment of the Constitution.

It is clear that the Bergstrom case (reversed for other reasons in the 8th Circuit) is in direct conflict with the holdings of the U.S. District Court for Northern Indiana and the United States Court of Appeals for the Seventh Circuit. Therefore, this court should give serious consideration to reviewing this issue.

Counsel urges the consideration of this issue by the court even though the father is pursuing his appeal of his aspect of the case through the Indiana Court of Appeals. It is not certain that the father will be able to present the constitutional matters here in issue to the Indiana Court of Appeals. The minor

citizen petitioner was not represented in the state trial court proceedings and was denied the right to intervene in the Indiana Court of Appeals. The Indiana Court of Appeals has also refused to stay the state trial court's removal order. The legal issue was properly and directly presented to the U.S. District Court for Northern Indiana pursuant to the Civil Rights Act of 1871, 42 U.S.C. §1983 and the proper route of appeal taken through the Seventh Circuit Court of Appeals to this court. The matter is ripe for determination by this court.

D. The Final Appeal of a Citizen of the United States

Allow counsel to make one final emotional appeal to this court in favor of granting the Writ of Certiorari. To be a citizen of the United States is everything. It ought to mean more than being a "person" within the meaning of those other constitutional provisions. Like a citizen of ancient Rome, a citizen of the United States ought to be able to claim some higher rights than anyone else within the jurisdiction of this government. He ought to be able to stand up in a court of American law and say, "I don't care what

the orders of the courts of a foreign land say. I claim the right of an American citizen not to be removed from this country against my will and if I am legally unable to determine my own will, then I ask this court to determine that "will" in my best interests." At a time when, in the City of Chicago, a Russian child is being allowed to remain in this country over the objections of both his parents, when criminals and misfits are being allowed sanctuary from Cuba, when even an alien is entitled to a due process hearing before being deported, surely a minor citizen of the United States is entitled to minimum constitutional protections and have his case heard and determined on the merits of his best interests in an American court.

The United States Court of Appeals for the Seventh Circuit has refused to stay its mandate and the Indiana Court of Appeals has refused to stay the trial court's removal order. The minor child is inimminent danger of being seized and removed from the United States without

any hearing on whether such is against his will or in his best interests. This court should grant the Writ of Certiorari here prayed for.

Respectfully submitted,

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In the

United States Court of Appeals

For the Seventh Circuit

No. 80-2240

HARALD SCHLEIFFER, a minor by next of friend Ann Ker,
Plaintiff-Appellant,

v.

EDWARD J. MEYERS, as judge of the Whitley Circuit Court of Whitley County, Indiana,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.
No. 80 C 152—Jesse E. Eschbach, *Judge.*

ARGUED DECEMBER 1, 1980—DECIDED MARCH 16, 1981

Before SPRECHER and CUDAHY, *Circuit Judges*, and WILL, *Senior District Judge.**

SPRECHER, *Circuit Judge.* This is an appeal from the final judgment of the District Court for the Northern District of Indiana dismissing plaintiff's petition for an injunction for failure to state a claim upon which relief can be granted. This is a civil rights case under 42 U.S.C. § 1983 by Harald Schleiffer, a minor, brought by next of friend, Ann Ker, against Edward J. Meyers, in his capacity as Judge of the Whitley Circuit Court, Whitley County, Indiana. Harald sought an injunction against enforcement of an order of the Circuit Court of Whitley

* Honorable Hubert L. Will, Senior District Judge for the Northern District of Illinois is sitting by designation.

County, Indiana, enforcing a Swedish decree awarding custody of Harald, a ten-year-old American citizen, to his mother, Hjordis Schleiffer, a resident and citizen of Sweden, and a subsequent order instructing Harald's father, John Schleiffer, to arrange for Harald to be returned to his mother in Sweden.

I

The unique nature of this action necessitates a rather detailed review of the facts. The facts, as gleaned from the briefs, the memorandum opinion below, and the opinion of Judge Meyers in the Indiana proceeding, appear to be undisputed.

Harald's parents were married in Norway in 1970. Harald was born July 17, 1970, in Sweden, where his parents had moved. At the time of Harald's birth, his father was an American citizen, and his mother was a Swedish citizen. Harald's birth was reported to and recorded by the United States Department of State on May 1, 1971. Harald's American citizenship was confirmed by a "Certificate of Birth Abroad of a Citizen of the United States" issued by the Department of State on October 25, 1978.

In May, 1976, John Schleiffer went to the Dominican Republic and commenced an action for divorce and for custody of Harald. Hjordis Schleiffer was without knowledge of these proceedings and received no notice or service of summons. On June 11, 1976, John took Harald to the United States to visit his grandparents in New Jersey. John wrote Hjordis on July 19, 1976, informing her of his desire for a divorce, but failing to inform her of the pending Dominican Republic proceeding. On July 29, 1976, a final decree of divorce and custody was awarded by default to John in the Dominican Republic proceeding. Hjordis first learned of this divorce decree in February, 1978. During the summer of 1976, John also commenced a proceeding for divorce and custody in the courts of New Jersey. Hjordis received service of process by mail. The resolution of this proceeding is unclear and appears to be immaterial to the issues before us.

Harald and his father returned to Sweden in August, 1976, and his parent's marriage was "reconciled". However, on December 18, 1977, Harald's parents filed a joint application for divorce in the District Court, Gothenborg, Sweden. It appears that in the application for divorce, the parties agreed that Hjordis should have custody of Harald. The Swedish court issued orders pendente lite that Hjordis have possession of the family residence, that Hjordis have custody of Harald, and that John pay support for Hjordis and Harald. During March, 1978, John, through his Swedish counsel, sought unsuccessfully to modify the pendente lite custody award.

On August 30, 1978, John, under the guise of taking Harald to Germany for a short vacation, brought Harald to the United States. Harald has remained in the United States in the care and custody of his father ever since.

In November, 1978, John, through his Swedish counsel, filed an application for absolute divorce in the Swedish divorce action. Harald's father sought, among other things, custody of Harald. A hearing was held in Gothenborg District Court on January 29, 1979, on the issues of divorce and custody. Harald's father appeared through his attorney, while Hjordis appeared personally and with counsel. Harald was not present at the hearing. On February 12, 1979, the Swedish court issued its decision granting the divorce and awarding custody of Harald to Hjordis. The court found, *inter alia*, that the parents had agreed in their application for divorce that Hjordis retain custody of Harald, that John had removed Harald to the United States without Hjordis' consent, and that these circumstances proved John to be less suitable as custodial parent. John has refused to comply with the Swedish court's award of custody and has not returned Harald to his mother's care and custody.

Even before the Swedish proceedings were final, Harald's father filed a "Motion for Provisional Order and Temporary Restraining Order Without Notice" in the Circuit Court of Whitley County, Indiana. This motion was supplemented on June 15, 1979, with a "Petition for Custody" praying that Harald be officially placed in

his father's custody. The record before us is incomplete as to what proceedings were held in the Indiana action. It is clear, however, that Hjordis came to the United States to defend against the father's request.

Judge Meyers issued his decision on July 1, 1980. He concluded that the Indiana Uniform Child Custody Jurisdiction Act, I.C. 31-1-11.6-1, et seq., applied to the case. He specifically found that the Swedish custody decree should be given international recognition pursuant to I.C. 31-1-11.6-23, which gives recognition to custody decrees rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons.[1] Judge Meyers then held that the Swedish decree was rendered pursuant to jurisdictional prerequisites substantially in accordance with Indiana law and that the Swedish court "has not declined to assume continuing jurisdiction to modify the initial decree." Therefore, Judge Meyers ruled that I.C. 31-1-11.6-14 prevented the Indiana courts from taking subject-matter jurisdiction of the custody petition. The court also refused, pursuant to I.C. 31-1-11.6-8(b),[2] to exercise its jurisdiction because John had removed Harald from the physical custody of his mother without her consent and in violation of the Swedish decree. Judge Meyers additionally declined to exercise jurisdiction because Indiana was an "Inconvenient Forum," and the exercise of jurisdiction would affront various purposes of the Indiana Uniform Child Custody Jurisdiction Act. He finally concluded that under I.C.

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[1] See footnote 7 *infra*.

[2] I.C. 31-1-11.6-8(b) states:

> Unless required in the interest of the child, the court shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner, without consent of the person entitled to custody, has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody. If the petitioner has violated any other provision of a custody decree of another state the court may decline to exercise its jurisdiction if this is just and proper under the circumstances.

31-1-11.6-6 he should not exercise jurisdiction while a similar custody proceeding involving Harald was pending in Sweden pursuant to jurisdiction substantially in conformity with Indiana law.

Judge Meyers, therefore, ordered John Schleiffer to turn Harald over to his mother pursuant to the Swedish decree and to pay Hjordis Schleiffer $210 in expenses and $2,500 for attorneys' fees. John Schleiffer did not comply with Judge Meyers' order, but filed with Judge Meyers a motion to stay and suspend enforcement of the judgment and to suspend the judgment pending appeal. After conducting a hearing, Judge Meyers on July 21, 1980, denied all motions and ordered John to arrange and pay for Harald to return to Sweden to rejoin his mother (who already had returned) by July 28, 1980. John has never complied with that order. We are informed by counsel that John currently is appealing to the Indiana Appellate Court Judge Meyers' judgment refusing to exercise jurisdiction.

The instant action was filed on August 1, 1980 in the United States District Court for the Northern District of Indiana. Harald, by next of friend Ann Ker, sought injunctive relief from enforcement of Judge Meyers' orders that would "deport" Harald from the United States or would order Harald to be delivered to persons who would remove him from the United States. Harald's claim was brought under the Civil Rights Act of 1871, 42 U.S.C. § 1983. Harald argued in his supporting memorandum that the state court's order removing him from the United States violated his civil rights as a citizen and deprived him of the rights, privileges, and immunities of the Constitution. He further argued that the state court orders constituted a deportation of a citizen, which, he argued, is exclusively a federal power limited in cases of citizens to deportation pursuant to a valid extradition treaty.

On August 11, 1980, the district court denied Harald's request for a hearing and dismissed his petition for injunctive relief for failure to state a claim upon which relief can be granted. The district court first concluded that the principles of *Younger v. Harris*, 401 U.S. 37

(1971), were no bar to federal court consideration of Harald's claim. But, the court concluded that the Anti-Injunction Act, 28 U.S.C. § 2283, prohibited the court from granting Harald's petition for injunctive relief. The court reasoned that this case was not a civil rights case, but was only a child custody contest. To the district court, Judge Meyers' orders were nothing more than an award of custody. Consequently, since there was no civil rights violation to lift the prohibitions of the Anti-Injunction Act, the district court dismissed Harald's petition. Harald appealed to this Court. We have stayed enforcement of Judge Meyers' orders pending resolution of this appeal.[3]

II

Parents have a primary constitutional right to direct the upbringing and education of their children while under their control.[4] "This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). But, children also have constitutional rights independent of those afforded their parents.[5] A child's constitutional rights, however, are not always equal to similar rights

[3] This appeal was docketed on September 3, 1980, and five days later Harald petitioned for a stay, which was denied on September 12, 1980 by a motion panel of three judges other than this panel. Harald's petition to reconsider the denial of a stay was denied on September 25, 1980. A brief second petition to reconsider, citing no new matter, resulted in the granting of a stay on November 3, 1980 by the motion panel, which stated no reasons for granting the stay.

[4] *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923).

[5] *In re Winship*, 397 U.S. 358 (1970); *In re Gault*, 387 U.S. 1 (1967); *Kent v. United States*, 383 U.S. 541 (1966).

of an adult.[6] In *Bellotti v. Baird*, 443 U.S. 622, 634 (1979), the plurality opinion by Justice Powell observed:

> The unique role in our society of the family, the institution by which "we inculcate and pass down many of our most cherished values, moral and cultural," *Moore v. East Cleveland*, 431 U.S. 494, 503-504 (1977) (plurality opinion), requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children. We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.

A

Before considering the pertinent factors involved in the present case and then balancing the constitutional claims of the custodial parent and the child, it is important to note one additional factor that pervades the parent-child relationship. Obviously, the ordinary dispute between a parent and child does not arise as a civil rights issue since it would lack the requisite state action in support of one side or the other. In those situations where there is state involvement, the outcome of the parent-child conflict often turns on whether the state chooses to exercise its discretionary power to favor one side or the other. The result, therefore, is often determined by state law and state decision, not by constitutional mandate. The constitutional balancing frequently will permit either outcome to the child-parent disute. *See Developments in the Law—The Constitution and the Family*, 93 Harv.L.Rev. 1156, 1377, 1383 (1980).

First, we consider the importance of the parental role in child rearing. Harald was reared by his mother and

[6] For example, see *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (no constitutional right to a jury trial in juvenile court).

father in Sweden for his first six years. After a two-month visit with his father to the United States, he and his father returned to Sweden, where he lived for two more years with his mother (and presumably also with his father). Under the guise of taking Harald to Germany for a short vacation, his father took him to the United States on August 30, 1978, where he has since remained. Having spent eight years in Sweden with his mother, he is no stranger to either his mother or her country.

The father, who had himself petitioned the Swedish court for an absolute divorce and was fully represented therein, was found by that court "to be less suitable as custodial parent of the child." That finding is understandable inasmuch as the father had previously agreed in writing that the mother should have custody, and yet he fled Sweden with the child. Two years earlier, the father had fled Sweden with Harald while he tried unsuccessfully to obtain a divorce in both the Dominican Republic and New Jersey. The father also brought the Indiana proceedings which recognized the Swedish decree and ordered that Harald be sent to his mother in Sweden.

We know little of Harald's mother except that she has prevailed in both the Swedish and Indiana courts. She also came to the United States in order to appear before the Indiana court. It is important to note that in Harald's skeletal petition in these federal proceedings, there is no allegation that his mother is unfit in any way; no allegation as to where or in whose custody Harald would end up if he prevailed here; no allegation as to the identity of Ann Ker, who brought this suit as Harald's "next of friend;" no allegation as to whether Ann Ker intends to assume the role of custodial parent, or her fitness to so act; and no allegation of the fitness of Harald's father if he intends to act as custodial parent. But most important, there is no allegation that relates in any way to the best interest of Harald or that attacks in any way the validity, integrity, or continuing viability of either the Swedish decree or the Indiana decree enforcing the Swedish decree. We are left with the un-

challenged assumption that it is in Harald's best interest to be under the care and custody of his mother.

The implications of this suit leave the upbringing and education of Harald in a total vacuum. Even if we assume that Harald was mature enough to seek independent counsel or at least to acquire a next of friend who had his best interest in mind, we cannot assume that at age 10½ Harald is mature enough to became emancipated and to provide for himself. To comply with Harald's petition to enjoin the Indiana decree would be to leave Harald without a parental custodian.

B

This brings us to the second factor to be considered: the inability of a child to make critical decisions in an informed, mature manner. We must assume on the bare record before us that Harald is acting upon his own preference, but in considering that preference we cannot isolate ourselves from reality. As the comprehensive Harvard Law Review comment on familial constitutional rights has noted:

> But although a young child may indeed be competent to make many important personal decisions, there is a strong reason to doubt his ability to make an enlightened decision as to which parent should be his guardian. A child's preference in such circumstances is uniquely likely to be based on considerations that run counter to his own long run best interests. For example, many children may automatically prefer the more lenient parent; many may be psychologically impelled to vent anger or act so as to punish one of the parents for getting a divorce. Perhaps most important, there is a strong likelihood that the choice will be improperly influenced by parental threats or promises.

Developments in the Law—The Constitution and the Family, 93 Harv.L.Rev. 1156, 1346-47 (1980) (footnotes omitted).

These considerations lead to the factor of the peculiar vulnerability of children. Either Harald already has been put through the trauma of suing to displace his natural mother as his guardian or he is unaware of the suit because it conceivably could have been filed by others without his knowledge. In either case, it would be even more traumatic for Harald to be brought before the court in a formalized fact finding hearing, or even before the federal district judge in chambers, to determine his actual preference as between his parents. This could be in the worst interest of Harald, see *Parham v. J.R.*, 442 U.S. 584, 610 (1979), and not particularly helpful to a solution.

Moreover, we must put Harald's preference to reside in the United States in the context of the entire family picture. Harald may indeed prefer to live in the United States, but we question whether the preference would still exist if it means the destruction, or deterioration of other family relations. In this case, the Swedish court, and indirectly the Indiana state court, have determined that, on balance, it is in Harald's best interest to maintain a family life with his mother. That Harald will be in the care, custody, and control of his mother necessarily implies some restriction upon Harald's own preferences, such as his desire to live in the United States. But, the balancing decision made by the Swedish court and the tradeoffs implicit within family life do not necessarily deny Harald his constitutional rights. Harald will remain an American citizen, will reside in a free country, and will retain his freedom to choose where he shall live once he is emancipated from his custodial parent. To exalt a ten-year-old's choice of residence over the larger question of which parent will care for him in his best interest would be to invert and subvert the normal family hierarchy.

Finally, we consider the state involvement. Indiana law requires that its courts give full faith and credit to foreign decrees substantially in conformity with a decree entered within a state of the United States. Ind. Code

31-1-11.6-23.[7] The Indiana court has accordingly determined to enforce the Swedish decree.

Each of the above considerations leads us to conclude that in the context of this child custody situation the constitutional rights of the child cannot be equated with those of an adult.

C

We must next consider what constitutional rights Harald seeks to claim. His petition and memorandum in the district court and his briefs in this court indicate that his most precise claim is that the Indiana decree amounts to a "deportation" from the United States and that a citizen cannot be deported. He broadly claims violation of due process and equal protection under the Fourteenth Amendment.

The "deportation" argument is based upon the constitutional right to travel, to exercise a choice of residence, and to leave or stay in the United States as one chooses. *Kent v. Dulles*, 357 U.S. 116, 125 (1958). That this undoubted right in adults is not always absolute in children has been adjudicated several times in the context of what has been called de facto deportations, that is, where deportable aliens have sired children born in the United States who are therefore American citizens. Many courts of appeal have concluded that the constitutional rights of such citizen-children are not violated when the deportation of their parents necessitates the children's de facto

[7] Ind. Code 31-1-11.6-23 provides:

The general policies of this chapter extend to the international area. The provisions of this chapter relating to the recognition and enforcement of custody decrees of other states apply to custody decrees and decrees involving legal institutions similar in nature to custody rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons.

deportation.[8] In such cases, it has been noted that the child's return to the foreign country "will merely postpone, but not bar, [his or] her residence in the United States if [he or] she should ultimately choose to live here." *Acosta v. Gaffney*, 558 F.2d 1153, 1158 (3d Cir. 1977).

In *Schneider v. Rusk*, 377 U.S. 163, 168-69 (1964), the Supreme Court said:

> A native-born citizen is free to reside abroad indefinitely without suffering loss of citizenship. . . . Living abroad, whether the citizen be naturalized or native born, is no badge of lack of allegiance and in no way evidences a voluntary renunciation of nationality and allegiance. It may indeed be compelled by family, business, or other legitimate reasons.

Consequently, we do not consider Harald's constitutional right to be an absolute bar to his custodial parent's decision to reside in Sweden. His constitutional right to travel and to reside in the United States is one of several rights involved in the family relationship. Harald retains his citizenship and his rights to return to the United States as an adult.

D

Before considering Harald's broader claims of deprivation of due process and equal protection, it is pertinent to observe that the whole subject of domestic relations, and particularly child custody problems, are generally considered state law matters outside federal jurisdic-

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[8] *Gonzales-Cuevas v. Immigration and Naturalization Service*, 515 F.2d 1222, 1224 (5th Cir. 1975); *Cervantes v. Immigration and Naturalization Service*, 510 F.2d 89, 91-92 (10th Cir. 1975); *Enciso-Cardozo v. Immigration and Naturalization Service*, 504 F.2d 1252, 1253-54 (2d Cir. 1974); *Robles v. Immigration and Naturalization Service*, 485 F.2d 100, 102 (10th Cir. 1973); *Perdido v. Immigration and Naturalization Service*, 420 F.2d 1179, 1181-82 (5th Cir. 1969); *Mendez v. Major*, 340 F.2d 128, 131-32 (8th Cir. 1965).

tion.[9] The single federal case with facts close to those in our case was resolved by federal deference to state authorities.

In *Bergstrom v. Bergstrom*, 623 F.2d 517 (8th Cir. 1980), the District of Columbia Superior Court had granted custody in 1978 over a then seven-year old child to her mother, who lived in Norway, during the school year, and to the father, who lived in North Dakota, during the summer. While the child was in North Dakota for the summer, the guardian ad litem for the child filed a federal action, claiming that the child's removal from the United States at the end of the summer violated her constitutional right as a citizen to live in the United States. The district court, after the submission of the report of a court appointed psychiatrist, held that the child possessed a constitutional right to remain in the United States, but that the question of custody *within* the United States should be determined in the state court. 478 F.Supp. 434 (D.N.D. 1979). The father then filed a custody action in the appropriate North Dakota court. That court granted total custody to the mother in Norway and found that the father's litigation of custody and his violations of the District of Columbia decree had resulted in emotional damage to the child. The North Dakota decree was appealed.

While that appeal was pending, the Eighth Circuit Court of Appeals vacated the federal district court's judgment on the ground that the constitutional issue of the child's right to remain in the United States was not ripe for decision and that the district court should have dismissed the child's complaint. 623 F.2d at 519. Citing *In re Burrus* and similar cases, the Court of Appeals said that "[r]eexamination of custody arrangements is a matter which belongs exclusively in state court." *Id.* at 520.[10]

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[9] *In re Burrus*, 136 U.S. 586, 593-94 (1890); *Huynh Thi Anh v. Levi*, 586 F.2d 625, 632 (6th Cir. 1978).

[10] The Supreme Court of North Dakota subsequently reversed the lower state court and reinstated the original custody decree of the District of Columbia court insofar as the

(Footnote continued on following page)

The *Bergstrom* case reinforces our belief that the child's residential preference properly is considered and resolved in the state court's custody proceedings designed to determine what is in the best interest of the child. The *Bergstrom* case also proves that the lengthy legal battles in state and federal courts may leave the child in a serious emotional state, despite the fact that the federal litigation presumably was initiated by the child.

The recent decision of the Second Circuit, in a case involving constitutional conflicts similar to those here, resolves Harald's remaining due process and equal protection claims. In *Leonhard v. United States*, 633 F.2d 599 (2d Cir. 1980), the mother and father were divorced and the mother was awarded custody of three children. She married a man who thereafter began to serve a prison sentence. The prisoner later entered into an arrangement with the federal government whereby in return for testifying against certain members of organized crime, he and his family were given new identities and were spirited away to a new and secret location. For several years, the father of the three children was not only deprived of visitation, but insofar as he knew, his children had disappeared completely from the face of the earth. He sued on behalf of himself and his children, claiming that the children's constitutional right not to be consigned to the company of a convicted criminal and their right not to be secreted out of the reach of their father were violated.

The Second Circuit Court of Appeals affirmed the district court's dismissal of the children's constitutional claims, concluding that the federal defendants' "reliance on . . . [the mother's] consent to the removal and conceal-

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[10] *continued*
split custody of both parents was involved. However, the court also held that the child should remain in the United States, not as a constitutional right but in the child's best interests. The court concluded that "the recommendations of expert witnesses on both sides dictate that it is in Ida's best interests to receive professional help in the form of therapy or counseling." *Bergstrom v. Bergstrom*, 296 N.W.2d 490, 491 (N.D. 1980).

ment of the children to protect them from organized crime, did not deny the children due process of law." 633 F.2d at 620-21 (footnote omitted). The court said at 620:

> This conclusion finds support in the recent decision of the Supreme Court in *Parham v. J.R., supra* [442 U.S. 584 (1979)]. Involved there was the question whether the state could constitutionally rely on a decision by a child's parent or guardian to commit the child to a mental institution without a hearing before or after the commitment. The Court held that despite the child's substantial liberty interest in not being confined, he has no constitutional claim when his parent or guardian has decided that he should be placed in a mental hospital and the hospital psychiatrists have determined that he needs treatment. *Id.* at 606-13. The liberty interest in *Parham* was clearly more substantial than the interest of the children here in the possibility of periodic visits from their father. And the effect of the parents' decision in *Parham*, i.e., the complete removal of the child from any family environment, was far more drastic than the effect here of the children's relocation accompanied by their mother. Since, as was held in *Parham*, a child has no right to a hearing when his parent decides to obtain needed medical treatment for him by transferring him from the family to the confinement of a mental institution, *a fortiori* children have no cause to complain when their custodial parent and the government officials charged with such functions decide to protect their safety by relocating and concealing them, with their parent. If the more drastic intrusion does not require a hearing, surely the less drastic intrusion does not.

Permitting Harald to be returned by his father to Sweden, where he had spent his first eight years, is neither as drastic as the placement of a child into a mental institution as in *Parham*, nor as drastic as secreting children from their father as in *Leonhard*. Enforcement of the Swedish custody decree by the Indiana court poses no constitutional deprivation to Harald.

III

In summary, balancing the constitutional rights of the custodial parent and the child, and considering all of the factors which affect this case, we conclude that Harald Schleiffer has not suffered a judicially remediable deprivation of civil rights which, as the district court has held, would be sufficient to overcome the obstacles interposed by the Anti-Injunction Act. Although Harald's best interest is for the determination of the Indiana or Swedish courts, we note in passing that the record before us indicates that his best interest will be advanced by terminating this proceeding as promptly as possible and allowing the state court to proceed.[11]

The judgment of the district court is affirmed.

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[11] On December 28, 1980, the President approved Public Law 96-611, which provides that the Federal locator service may be used in connection with the enforcement of a child custody decree and in cases of parental kidnapping; and provides specifically that the existing provision of the Criminal Code dealing with flight to avoid prosecution or giving testimony, 18 U.S.C. § 1073, shall apply in the case of parental kidnapping. This law provides a current assessment of the Congressional attitude toward parental kidnapping.

CUDAHY, *Circuit Judge*, concurring. I concur fully in Judge Sprecher's excellent opinion in this murky and potentially tragic impasse but wish to elucidate what seems the heart of the matter to me.

Harald seeks recognition for either (1) a constitutional right, as a citizen, to remain in the United States, or (2) a right to a due process hearing with respect to the order sending him to Sweden and depriving him of a constitutionally protected liberty interest. Parenthetically, I think it plausible that Harald does in fact presently want to stay in the United States. Children generally prefer things as they are, and, at ten or eleven, "home" is where they have been for the last year or two.

However,

> [t]he involvement of a constitutional right for minors by no means lifts a case above the practical and policy problems of minority status into some abstract sphere in which an abandonment of that special body of law that has always applied to children is justified. When both parents and children are involved, . . . the law must concern itself even more with that special context, since a court must then confront the unique legal and social role of parents.

Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights"*, 1976 B.Y.U. L. Rev. 605, 641. Although there is sufficient state action here to invoke the protections of the Constitution, *see Shelly v. Kraemer*, 334 U.S. 1 (1948), the real conflict from a federal viewpoint in the instant case is between Harald's desire to remain in this country and the essentially private action of his mother in choosing to live in Sweden.[1] Any evaluation of the scope of

[1] I deem it immaterial, when one parent has lawful rights to custody of the child, that the decision to live in Sweden has been made by only that parent. *See Leonhard v. United States*, 633 F.2d 599, 619 & n.28 (2d Cir. 1980). Harald does not challenge his mother's right to custody; he is willing to remain in her custody if she elects to live in the United States.

(Footnote continued on following page)

Harald's protection under the Constitution must focus on our concern with Harald's rights to be protected against a parental decision that he thinks is contrary to his interests.[2] While such rights to override parental powers of decision having the support of state laws have been recognized in other contexts, *e.g., Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Bellotti v. Baird*, 443 U.S. 622 (1979), those individual circumstances were closely linked with the arguably crucial or irrevocable nature of the interest asserted by the child and the correspondingly diminished interest of the parents. But in the more common case, "[l]egal restrictions on minors, *especially those supportive of the parental role*, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding." *Bellotti*, 443 U.S. at 638-39 (emphasis supplied).

Minors, as well as adults, are protected by the Constitution, however, even when that protection operates to subvert the normally dominant parental role. For example, in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 72-75 (1976), the Court evaluated the right of a pregnant minor to an abortion under a state statute requiring the consent of a parent to such an abortion. The Court struck down the statute because the interest of the minor child in making a decision of such consequence, assuming sufficient maturity, was deemed paramount over any asserted right of parental control. The Court reached this conclusion despite the complex medical and ethical considerations involved in the

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[1] *continued*
Appellant's Brief at A-10. Certainly the factors considered by the Swedish court in awarding custody are not relevant to a determination of Harald's rights under the Constitution.

[2] This distinguishes this case from others establishing constitutional rights for children where the parents side with the child against the state. *E.g., Tinker v. Des Moines School District*, 393 U.S. 503 (1969); *In re Gault*, 387 U.S. 1 (1967). In such cases, a minor's constitutional rights pose no disruptive problems for the family.

decision to undergo an abortion. But, as was emphasized in a subsequent decision, *see Bellotti*, 443 U.S. at 642, the grave and irrevocable consequences that could flow from unwanted motherhood presumably make the abortion circumstance somewhat unique. Similarly grave consequences would not seem to flow, however, from a denial of the child's apparent wishes in the instant case. To the contrary, the most severe and deleterious consequences could flow from *granting* Harald the rights that he seeks here.

The companion cases of *Parham v. J.R.*, 442 U.S. 584 (1979), and *Secretary of Public Welfare v. Institutionalized Juveniles*, 442 U.S. 640 (1979), provide additional insights into the delicate balancing of constitutional interests when the wishes of parents and children collide. Both cases involve the question of what process is due when parents seek state institutional mental health care for one of their children. The Court ruled that a formal adversarial pre-admission hearing was not necessary and that the state could rely on the parents' decision to commit a child to a mental institution as long as a "neutral factfinder," *i.e.*, the admitting physician, still determines whether the statutory requirements for admission are satisfied. *Parham*, 442 U.S. at 606. The Court acknowledged that some parents might attempt to "dump" an unwanted child in a mental home but refused to require a pre-admission hearing into the motivation of the parents because of the disruptive effect of such a hearing on the parent-child relationship. *Parham*, 442 U.S. at 610.

While each set of circumstances may obviously be very different from the others, it is clear that any constitutional rights that a young child may possess to override unpalatable parental decisions are (and in my view should be) very limited.[3] Institutionalization in a mental

[3] In circumstances where the parent is unfit or acts contrary to the best interests of the child, state intervention into the familial relationship on behalf of the child may be justified. *See Parham*, 442 U.S. at 624 (Stewart, J., concurring); *Id.* at 630-31 (Brennan, J., dissenting). Harald has made no such

(Footnote continued on following page)

home involves a very serious deprivation of the child's liberty interest—yet, the Court was willing to "permit the parents to retain a substantial, if not the dominant, role in the decision . . . ." *Parham*, 442 U.S. at 604. To give Harald a veto power over his mother's decision to live in Sweden would be to reverse the normal roles of parent and child in the family setting.

> Though a child who is not yet fully mature in all respects may be able to make mature decisions concerning certain activities, the parent-child relationship cannot be separated by subject matter into component parts. Litigation over the child's capacity to make [one] decision may endanger that relationship. If disagreement between parent and child over a contested right has not already 'fractured the family structure,' the state has a legitimate interest in preserving the parental role in guiding the child in other decisions that he is not yet mature enough to make alone. The psychological costs of litigation may even justify recourse to arbitrary line drawing by age, sacrificing the interests of the unusually precocious child at an age at which the availability to his contemporaries of individualized inquiry would only serve as a forum for immature aggression.

Developments in the Law—The Family, 93 Harv. L. Rev. 1156, 1380 (1980) (footnotes omitted). A child of less than eleven is simply not capable of going it alone. If Harald is able to remain in the United States contrary to the wishes and decision of his custodial parent, who will assume responsibility for his care? I am reluctant to make a child *de facto* a ward of the state because of a disagreement over where the family will live.[4] The

[3] *continued*
claim in the instant case, however, and it is in any event doubtful that such a claim would properly be brought in federal court. State laws provide redress for the problems created by unfit parents.

[4] I am also reluctant to recognize the father as an alternative provider of care for Harald because this would condone his "kidnapping" of Harald in apparent violation of the Swedish custody decree. In any event, custody is for the state courts to determine.

power that Harald seeks to exercise over his own life is simply inappropriate to a child of his limited age and maturity. For this reason I would decline to recognize any independent constitutional right that Harald, not yet eleven, might exercise to challenge the decision of his custodial parent as to where she and her son will live.

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UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 3, 1980.

Before

Hon. Thomas E. Fairchild, Chief Judge
Hon. Luther M. Swygert, Circuit Judge
Hon. William J. Bauer, Circuit Judge

HARALD SCHLEIFFER, a minor by next friend ANN KER, Plaintiff-Appellant,	)	Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.
No. 80-2240 vs.	)	
EDWARD J. MEYERS, as Judge of the Whitley Circuit Court of Whitley County, Indiana, Defendant-Appellee.	)	No. 80-C-152 Jesse E. Eschbach, Judge

This matter comes before the court on plaintiff-appellant's second petition filed herein on October 14, 1980, to reconsider this court's order of September 12, 1980, denying plaintiff-appellant's petition for a temporary restraining order and injunction pending appeal.

On consideration thereof,

IT IS ORDERED that this court hereby GRANTS the petition to reconsider, VACATES its September 12, 1980 order and GRANTS injunctive relief as described herein.

It is FURTHER ORDERED that defendant-appellee, the Honorable Edward J. Meyers,

as Judge of the Whitley Circuit Court, Whitley County, Indiana, and his successors in that capacity; plaintiff-appellant's mother, Hjordis Beate Schleiffer and her attorney John S. Bloom; the Attorney General of Indiana; and any other interested party with notice of this order are enjoined from taking any action which would result, directly or indirectly, in the removal of the plaintiff-appellant from the jurisdiction of this court while the appeal in this matter is pending. Specifically, defendant-appellee, his successor, Hjordis Beate Schleiffer and her attorney, the Attorney General of Indiana, and any other interested party with notice of this order are enjoined pending appeal from enforcing Judge Meyers' order of July 1, 1980, that plaintiff-appellant be returned to the custody of the custody of his mother in Sweden.

IT IS ALSO FURTHER ORDERED that this appeal be briefed and heard on an expedited schedule. Accordingly,

1. Defendant-appellee's brief will be due herein on or before November 14, 1980.

2. Plaintiff-appellant's reply brief, if any, will be due herein on or before November 24, 1980.

3. Oral argument will be scheduled between December 1 and 12, 1980, the parties to be notified of the precise date.

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
FORTH WAYNE DIVISION

HARALD SCHLEIFFER, a minor, by next of friend, Ann Ker,	)	
Petitioner,	)	
V	)	CIVIL NO. F 80-152
EDWARD J. MEYERS, as Judge of the Whitley Circuit Court, Whitley County, Indiana,	)	
Respondent.	)	

MEMORANDUM OF DECISION AND ORDER

This cause is before the court upon petitioner's request for a hearing to consider his claim for an injunction against enforcement of an order of the Circuit Court of Whitley County, Indiana, awarding custody of petitioner, a ten-year-old child and an American citizen, to his mother, a resident of Sweden. Petitioner has submitted a brief urging that intervention by this federal court in a pending state court proceeding is permissible in light of the express exceptions in the "Anti-Injunction Act," 28 U.S.C. § 2283 (1976). Accepting

as true all of the allegations in said petition and exhibits thereto, petitioner's request for a hearing is denied and the petition dismissed for failure to state a claim upon which relief can be granted.

FACTURAL BACKGROUND

This action is brought by petitioner Harald Schleiffer, a minor, by his next friend Ann Ker, who alleges that the respondent Edward J. Meyers, Judge of the Circuit Court of Whitley County, Indiana, has issued orders which have the effect of deporting or causing the removal of the petitioner from the United States of America, thereby abridging his civil rights without due process of law.

From the order of Judge Meyers in Whitley Circuit Court Cause No. C-79-47 (attached to the petition), it appears that John Eric Schleiffer, father of petitioner, and Hjordis Schleiffer, mother of petitioner, were married in Norway in 1970 and that petitioner was born in Sweden in the same year after his parents had moved to Sweden. The parties remained in Sweden from 1970 until August 1978 except for a period of two months from June 1976, when the father brought petitioner to the United States without

the mother's permission, until August 1976, when the father returned to Sweden with petitioner.[1]

In 1977, petitioner's father and mother jointly filed for divorce in a Swedish court. Throughout the Swedish divorce proceedings, the father had notice of the proceedings and was represented by Swedish counsel. In 1979, the Swedish court entered a divorce decree and granted custody of the child to the mother. In 1978, however, petitioner's father removed petitioner to the United States without obtaining the permission of petitioner's mother or the Swedish court. Thereafter, on October 25, 1978, the Department of State granted petitioner a "Certificate of Birth Abroad of a Citizen of the United States of America."[2]

In 1979, in the face of the Swedish decree in favor of the mother, petitioner's father, who still exercised illegal dominion over the child, filed a Petition for Custody in the Whitley Circuit Court in Columbia City, Indiana. In response, the mother came from Sweden to contest this action. The state court, on July 1, 1980, granted full force and effect to the Swedish decree, entered judgment in favor of the mother, and ordered the father to

return petitioner to his mother within 15 days. On July 21, 1980, the father was granted 15 additional days in which to return the child to his mother, who apparently had subsequently returned to Sweden. On August 1, 1980, the petitioner, by his next friend, filed this petition seeking to set aside the state court order.

The petition purports to state a claim under 42 U.S.A. § 1983 as well as claims directly under the Fourth and Fourteenth Amendments to the United States Constitution. These claims all hinge on the contentions that the state court order constitutes an unreasonable seizure of the petitioner or a deprivation of his rights, privileges, and immunities as a citizen without due process of law. The petition also maintains that the state court order is subject to attack because the power to deport or remove a citizen from the United States lies within the exclusive jurisdiction of the federal courts.

Federal court intervention in pending state court proceedings poses the risk of "needless obstruction to the domestic policy of the states . . . ." Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 471 (1945). When a petition for such intervention raises fundamental questions

of "equity, comity and federalism," then the evolving doctrine of Younger v. Harris, 491 U.S. 37 (1971) mandates that federal relief be denied unless the petitioner can establish that the state court proceedings are infected by bad faith, harassment, or extraordinary circumstances. Id. at 54.

The Younger line of cases primarily involve pending state court civil and criminal proceedings to which the state itself is a party; but in Juidice v. Vail, 430 U.S. 327 (1977), the doctrine was extended to state court contempt proceedings instituted against persons who failed to appear in actions to enforce judgments culminating from litigation between private parties. Applicability of Younger abstention hinges not on whether the state is a party but, rather, on whether "improtant state interests," such as civil contempt proceedings, see Juidice v. Vail, supra, or child custody cases, are at stake. See Moore v. Sims, 99 S.Ct. 2371, 2377 (1979).

Judge Meyers' order is strictly addressed to child custody, an issue traditionally reserved for the state courts. Furthermore, the July 21 order states that petitioner's father will be held in

contempt if he should fail to return petitioner to his mother. This leaves the state court proceedings in a posture very similar to that of Juidice v. Vail, supra, where the Younger rule was held to apply. Juidice and Moore make it clear that the state interests involved in this cause are strong enough to invoke the Younger principles.

However, the next step in the analysis calls for a determination of whether the petitioner's "constitutional claims could have been raised in the pending state proceedings." Moore, supra, at 2378. The Whitley Circuit Court Judgment is devoted entirely to issues of child custody; it makes no mention of the petitioner's civil rights. Petitioner was not properly a party in the state case and thus was unable to raise those contentions, and neither his father nor his mother had standing to raise them in the circuit court. In Bickham v. Lashof, No. 78-2559 (7th Cir. April 29, 1980), the Seventh Circuit held that Younger did not bar a physician from litigating in a federal court issues which he had been unable to raise in a state administrative proceeding instituted against an abortion clinic in which the physician was the sole stockholder. The state agency had

sanctioned the clinic for performing abortions without a state license. In federal court,the physician, in his individual capacity, argued that the relevant state law abridged his constitutional right to perform abortions in unlicensed facilities. While conceding that there was a certain degree of overlap between the issues involved in the state and federal proceedings, slip op. at 11, the Seventh Circuit concluded that the interests of the corporation and those of the physician were sufficiently distinct to preclude application of the Younger doctrine. Id., distinguishing Hicks v. Miranda, 422 U.S. 332 (1975). Since the judgment of the state circuit court indicates that petitioner's civil rights claims were not raised in the custody proceeding, and since petitioner himself had no opportunity to raise those issues there, the evolving doctrine of Younger and its progency is not a bar to his assertion of those claims in this court.

THE ANTI-INJUNCTION ACT

Even though this petition has steered through the murky waters of the Younger doctrine, it must be denied because it fails to surmount the more general obstacles

interposed by the "Anti-Injunction Act."

The Anti-Injunction Act, 28 U.S.C. § 2283 (1976), prevents federal courts from staying "proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." The Act thus calls for an analysis of the scope of the proceedings pending in state court, the basis of the federal court petitioner's claims for relief and whether those claims fit within the statutory exceptions to the general prohibition. The threshold requirement is satisfied because in its current posture, the state court proceeding is still pending. The order to the father is still executory, and the time for appeal has not expired.

Petitioner characterizes his claims as involving a deprivation of civil rights and an unlawful deportation.

This is not a civil rights case. While the Supreme Court has held that § 1983 actions are "expressly authorized" exceptions to the Anti-Injunction Act, Mitchum v. Foster, 407 U.S. 255 (1972), the logic of petitioner's § 1983 claim is that every child who objects to his or her parents' choice of domicile has suffered a

judicially remediable deprivation of civil rights. A child's civil rights, however, are governed by the presumption that parents act in the best interests of their children. Parkham v. J.R., 99 S.Ct. 2493, 2505 (1979). "Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions. . . . Parents can and must make those judgments." Id.

In child custody contests, state courts are competent to determine - in light of the best interests of the child - which parent shall have custody, even when the award of custody effects a change in the state of residence of the child. See Ford v. Ford, 371 U.S. 187 (1962). Petitioner does not attack the validity of the Swedish decree, and, under Indiana Code Ann. § 31-1-11.6-23 (Burns Supp. 1979), the Indiana courts are required to give full force and effect to valid custody decrees of other nations. The circuit court's award of custody over petitioner to a resident of Sweden, pursuant to a valid Swedish decree, cannot be distinguished from the common situation in which children subject to the jurisdiction of the Indiana courts are awarded to the custody of parents who reside in neighboring

states. As the parent with legal custody, petitioner's mother is fully entitled to determine that he shall be returned to Sweden. Petitioner will remain an American citizen. Restoring petitioner to the custody of his mother will not deprive petitioner of any of his rights as an American citizen.

Furthermore, Judge Meyers' memorandum order of July 21, 1980, which directs petitioner's father to return the child to Sweden, would not have issued if petitioner's father had timely complied with the original order of July 1, 1980, which simply required the father to surrender the child to the mother. Petitioner cannot rely on such a fortuity in seeking to support his civil rights contention. No matter how it is examined, Judge Meyers' order is nothing more than an award of custody over petitioner to the mother, and an award of child custody based on a full adversarial judicial proceeding with due notice to all parties cannot be viewed as a deprivation of civil rights.

Petitioner's other contention is that Judge Meyers' order has the "effect" of a deportation. Under 8 U.S.C. § 1105(a) (1976), the federal courts have exclusive jurisdiction over appeals from deportation

orders. Petitioner maintains that this satisfies the "expressly authorized" and also the "in aid of jurisdiction" exceptions to the Anti-Injunction Act. These propositions, however, can be of no aid to the petitioner unless the state circuit court order can be equated with a deportation, and any purported exception to the Anti-Injunction Act must be narrowly construed. See Amalgamated Clothing Workers v. Richman Brothers, 348 U.S. 511, 515-16 (1955).

When a person is deported, that person is placed under the supervision of the Attorney General and must exit the country within six months of the deportation order. If a deportee subsequently reenters the United States unlawfully, he is automatically subject to expulsion. See 8 U.S.C. §§ 1252(c), (f) (1976). Thus, a strict interpretation of the immigration laws discloses that a deportation involves expulsion, perpetual denial of reentry, and supervision by the Department of Justice. None of these elements exist as a result of the state circuit court order.

The order simply directs the father to return the petitioner to the custody of his mother in Sweden. It is not an expulsion order directed at the petitioner, the order

in no way prevents him from returning to the United States after he has been restored to his mother's custody, and he is to be sent overseas by his father, not by an official of the Justice Department.

The order of the state circuit court cannot be construed as anything other than a conventional child custody decree. It is neither a deprivation of petitioner's civil rights nor a deportation. It is clear that dismissal of the petition is mandated by the Anti-Injunction Act.

ORDER

Accordingly, petitioner's request for a hearing is hereby denied and the petition dismissed for failure to state a claim upon which relief may be granted.

Entered this 11th day of August, 1980.

/s/ Jesse E. Eschbach
United States District Judge

[1]According to Judge Meyers' Judgment Order, during the father's absence from Sweeden in 1976, he obtained a Dominican Republic default divorce decree and decree of custody over the petitioner. Judge Meyers held these decrees to be invalid for lack of notice to the mother. Also in 1976, while the father was staying with his parents in New Jersey, he instituted divorce proceedings in a New Jersey court.

[2]The petition fails to indicate the grounds for this certificate, but it seems to have been granted because petitioner's father was a United States citizen.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

HARALD SCHLEIFFER, a minor, By next of friend Ann Ker,	)	
Petitioner	)	
VS	)	CAUSE NO. F-80-152
EDWARD J. MEYERS, as Judge of the Whitley Circuit Court, Whitley County, Indiana and all successors,	)	
Respondent	)	

VERIFIED PETITION FOR WRIT OF PROHIBITION (INJUNCTION)

Comes now Harald Schleiffer, a minor child, by next of friend Ann Ker and petitions this court to issue a Writ of Prohibition (injunction) against the Judge of the Whitley Circuit Court of Whitley County in the State of Indiana from enforcing his orders of July 1, 1980, July 21, 1980 and any other orders which have the effect of deporting the petitioner, a citizen of the United States, from the United States, including, orders requiring the petitioner to be delivered to persons who would remove the petitioner from the

United States. In support of this petition, the petitioner now shows the court:

I. Facts involved in this petition.

1. That the petitioner Harald Schleiffer resides in Whitley County, Indiana within the jurisdiction of this court.
2. That the petitioner Harald Schleiffer is a citizen of the United States of America.
3. That the Judge of the Whitley Circuit Court of Whitley County, Indiana in Cause No. C-79-47 has issued orders on July 1, 1980 and July 21, 1980 which have the effect of deporting the petitioner from the United States of America or causing the removal of the petitioner from the United States of America.
4. That the actions and orders of the Judge of the Circuit Court of Whitley County, Indiana were taken under color of state law, being the Indiana Uniform Child Custody Jurisdiction Act, Indiana Code 31-1-11.6.
5. That the aforementioned orders of the Whitley Circuit Court are that the father of the petitioner

John Erick Schleiffer deliver the petitioner to the petitioner's mother Hjordis Beate Schleiffer who resides and is domiciled in and is a citizen of Sweden.

6. That your petitioner does not wish to be deported or otherwise removed to Sweden.

II. The issues herein presented are as follows:

1. Will the orders of the Whitley County Circuit Court deprive the petitioner of any right, privileges, or immunities secured by the Constitution and laws of the United States.
2. If there has been such a deprivation, is the petitioner entitled to the protection of the Civil Rights Act of 1871 being 42 U.S.C. § 1983.
3. Do the orders and actions of the Whitley Circuit Court invade matters which are within the exclusive jurisdiction of the United States government and courts.

III. The relief sought by this petition is:

That this court issue a writ of

prohibition (injunction) against the Judge of the Whitley Circuit Court of Whitley County, Indiana preventing him for issuing any further orders or enforcing present orders which have as their direct or indirect effect the deportation or removal of the petitioner from the United States of America. This would include preventing the court from ordering the placement of the petitioner in the custody of the mother who is a resident of and domiciled in the country of Sweden until such time as said mother takes up permanent residence within the United States of America.

IV. This writ should be issued for the following reasons:

1. That the petitioner is a citizen of the United States of America.
2. That the orders of the Whitley Circuit Court violate the petitioner's right to be secure in his person against unreasonable seizure in violation of the Fourth Amendment to the U.S. Constitution.
3. That the orders of the Whitley Circuit Court violate the

petitioner's rights as set out in Section 1 of 14th Amend. to the U.S. Constitution.

4. That the orders of the Whitley Circuit Court invade matters which are within the exclusive jurisdiction of the United States being the right to deport or remove persons from the United States.

V. Attached hereto as a part of this petition are the following orders and documents necessary for an understanding of the issues herein presented:

1. A copy of a certification of birth abroad of a citizen of the United States of America reported to the U.S. Department of State on May 11, 1971. This copy of the certificate was certified on October 25, 1978.
2. A copy of the Judgment and Order of Edward J. Meyers as Judge of the Whitley Circuit Court of Whitley County, Indiana dated July 1, 1980.
3. A copy of the docket entry of Edward J. Meyers, Judge of the Whitley Circuit Court of Whitley

County, Indiana entered on July 21, 1980.

VI. I affirm under the penalties for perjury that the above and foregoing statements and copies of documents are true and correct.

/s/ Ann Ker
Ann Ker, Next of friend for Petitioner Harald Schleiffer, a minor

/s/ Donald D. Doxsee
Donald D. Doxsee
Attorney for Petitioner
323 W. Berry Street
Fort Wayne, IN 46802
Phone: 219/422-3436

MEMORANDUM

I. Jurisdiction

A. Jurisdiction of the Person

This court has jurisdiction of the persons because both the petitioner and the respondent reside within the District and Division.

B. Jurisdiction of the Subject Matter

This court has jurisdiction

of the subject matter because it is brought for violations of a federal statute, the Civil Rights Act of 1871, 28 U.S.C. § 1983.

II. Power to Issue Writ of Prohibition

This court has the power to issue a writ of prohibition against a judge of a state court pursuant to the Civil Rights Act of 1871. That act gives the petitioner the right to redress "at law, suit in equity, or other proper proceeding". The petitioner is aware that 28 U.S.C. § 2283 prohibits federal courts from issuing injunctions "to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments". However, the Civil Rights Act of 1871 has been held to expressly authorize the injunctive writ here being sought. This is supported by the cases and discussion in 7B Moore's Federal Practice § 2283, 1A Moore's Federal Practice § 0.208 (3-4), and 7 (Pt. 2) Moore's Federal Practice § 65.19.

The citation at 1A Moore's

Federal Practice § 0.208 (3-4) also discusses the use of the writ in aid of preserving the exclusive jurisdiction of the federal courts.

III. Issues Presented by the Petition

A. Deprivation of Rights

The first question is whether or not the action of the Whitley Circuit Court deprives the petitioner of any rights, privileges, or immunities protected by the Constitution and laws of the United States.

The petitioner believes that there is no doubt that the action of the Whitley Circuit Court has so deprived him. The Circuit Court's action will result in the petitioner being deported or otherwise removed from the United States and from the protection of U.S. law. This is a violation of one of the most important rights of citizenship. It also violates his right to be secure in his person from unreasonable seizure under the 4th Amendment to the United States Constitution and more particularly his rights under the 14th Amendment to the United

States Constitution which prohibits a state from abridging the privileges or immunities of citizens of the United States, depriving a person of liberty without due process, and denying equal protection of the law.

There can be no doubt that the act of ordering the deportation of a citizen or of causing his removal from the United States by State court in a violation of constitutional rights. Even the federal government cannot deport a citizen except pursuant to an extradition treaty (which then has the force of constitutional law). All other acts of deportation by the federal government are of non-citizens or of persons who have first been stripped of their citizenship for fraud or other illegal act in acquiring citizenship.

B. Violation of Civil Rights Act

The orders of the Whitley Circuit Court constitute a violation of the petitioner's civil rights under the Constitution. The orders were done by a state

court judge under color of the state law on child custody, Indiana Code 31-1-11.6. Violations under color of state law are subject redress in the United States District Court pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983.

C. Exclusive Jurisdiction

As pointed out in the discussion under III A above the right to deport or remove a person from the United States rests exclusively with the United States Government and with the federal courts. This exclusive power is pursuant to Article I, Section 8 dealing with the power to "establish an uniform Rule of Naturalization" and the power to make all laws necessary and proper to carry that power into execution. See 3 Am Jur 2d "Aliens and Citizens" §§ 120, 121 and 163.

/s/ Donald D. Doxsee
Donald D. Doxsee
Attorney for Petitioner
323 West Berry Street
Fort Wayne, IN 46802
Tel: 219/422-3436

A-47

DEPARTMENT OF STATE
WASHINGTON, D.C.

Certification of Birth Abroad

of a Citizen of the United States of America

This is to certify that according to records on file in the Department of State

HARALD HANS-ERIC SCHLEIFFER

Sex Male *was born at* Östra Sjukhuset, Goteborg, Sweden

on July 17, 1970 *Report of birth recorded on* May 11, 1971

In Witness Whereof, I have hereunto caused the seal of the Department of State to be affixed and my name subscribed by the Authentication Officer of the said Department this Acting twenty-fifth *day of* October 19 78

(SEAL)

Secretary of State

By Acting
Authentication Officer, Department of State

WARNING: This certificate is not valid if it has been altered in any way whatsoever or if it does not bear the raised seal of the Department of State.

FORM DS-1350
1-73

STATE OF INDIANA	IN THE WHITLEY CIRCUIT COURT
COUNTY OF WHITLYE, SS:	GENERAL QUARTER TERM, 1980
	CAUSE NO. C-79-47
IN RE: THE CUSTODY OF)	
)	JUDGMENT AND
HARALD HANS-ERIC)	ORDER
SCHLEIFFER)	

The Court having taken this cause under advisement now finds:

1. The parties were married in Bergan, Norway, in 1970, and the child which is the subject of this dispute was born in 1970. The parties lived in the country of Sweden from 1970 until the petitioner, John Eric Schleiffer, moved to the United States in August, 1978, taking the child, Harald Hans-Eric Schleiffer (hereafter referred to as "Hans") with him.

2. In May of 1976, Eric Schleiffer commenced an action for divorce and custody of Hans in the Dominican Republic, which action was commenced without any knowledge of the respondent, Hjordis Schleiffer, nor any service of summons.

3. On June 21, 1976, Eric Schleiffer took the child, Hans, with him to the United States without advising Hjordis of the pending Dominican Republic divorce

action. On July 19, 1976, the husband wrote Hjordis a letter from his parents' home in New Jersey and informed her that he was contemplating a divorce. On July 29, 1976, Eric obtained a final divorce and custody decree in the Dominican Republic, in which action the respondent, Hjordis, was defaulted, but no proof was made that she was served with any process. That decree granted an absolute divorce to Eric and awarded him custody of the child of the parties.

4. At no time was the child, Hans, living in the Dominican Republic during the divorce action.

5. In the summer of 1976, the petitioner, Eric Schleiffer, also commenced a divorce and custody action in the courts of New Jersey. In this action, service of process by mail was made upon the respondent in Sweden.

6. In August, 1976, the petitioner returned to Sweden. The respondent had filed a complaint with the authorities against petitioner for removing the child of the parties from Sweden without her permission. Pursuant to discussions had between the parties at that time, the "marriage" was reconciled and the child, Hans, was returned to Sweden from New Jersey.

7. The parties filed a joint application for divorce in the District Court, Gothenborg, Sweden, on December 18, 1977.

8. The District Court of Gothenborg entered the following orders pendente lite:

(a) That Hjordis Schleiffer have possession of the marital domicile;

(b) That Hjordis Schleiffer have custody of Harald-Hans Eric Schleiffer;

(c) That Eric Schleiffer pay support for both Hjordis Schleiffer and the child of the parties

9. In February, 1978, the respondent first obtained knowledge of the Dominican Republic divorce action instituted by petitioner.

10. On March 8, 1978, Eric Schleiffer retained Cisila Mortimer, a Swedish attorney, to represent him in the pending divorce action by executing a power of attorney, which was subsequently filed in the District Court of Gothenborg on November 29, 1978.

11. In March 1978, Cesila Mortimer corresponded with respondent's attorney, Christer Wahlgren, in an attempt to secure a modification of the pendente lite custody

order by agreement, which suggestion was rejected by respondent.

12. On August 30, 1978, the petitioner removed the child from the care and custody of respondent under the guise of taking the child to Germany for a short vacation. Instead,the petitioner took the child to the United States without the knowledge or permission of respondent.

13. In October 1978, the petitioner returned to Sweden without the child and on October 10, 1978, conferred with Cesila Mortimer concerning the pending Swedish divorce action.

14. On November 28, 1978, Cesila Mortimer, acting on behalf of petitioner, filed an application for absolute divorce in the pending Swedish divorce action which had been commenced by the parties on December 18, 1977. In said application, petitioner prayed the Court for custody of the child of the parties, for an absolute divorce from respondent, and for support to be paid by respondent for the benefit of the child. In said petitioner, the attorney for petitioner recited the fact that he was domiciled in the United States with the child of the parties since August of 1978.

15. On January 29, 1979, the Gothenborg

District Court held a hearing on the issues of divorce of the parties and custody of Hans. The petitioner appeared only by his attorney, and respondent appeared in person and by counsel. The Court records contained the following findings:

(a) That Cesila Mortimer has had contact with the petitioner, John Eric Schleiffer, and has been authorized by him to appear on his behalf.

(b) That the parties stipulated the application of Swedish law to the proceeding.

16. The Gothenborg District Court announced its decision in the Schleiffer divorce on February 12, 1979, which decision contained the following findings of fact:

(a) That the parties had agreed that the wife (Hjordis) should have custody of the child in their joint application for divorce.

(b) Nevertheless, the husband (Eric) without the wife's consent, took the child to the United States and does not plan to return to Sweden with the child.

(c) The circumstances prove the husband to be less suitable as custodial parent of the child.

Upon those findings, the Court entered a decree granting the wife (Hjordis) custody of the child and ordering the husband (Eric) to pay support.

17. On January 31, 1979, petitioner filed a "Motion for Provisional Order and Temporary Restraining Order Without Notice" in this Court, along with a Petition for Support. On June 15, 1979, petitioner filed a Petition for Custody, requesting this Court to order the child of the parties placed in his custody.

BASED UPON THE ABOVE FINDINGS, the Court now concludes:

1. The law is with the respondent and against the petitioner.

2. The Indiana Uniform Child Custody Jurisdiction Act (I.C. 31-1-11.6-1 et seq.) applies to the facts of this case in the following particulars:

(a) I.C. 31-1-11.6-23 International Application entitled the Swedish court order of February 12, 1979, the same weight as an order entered by a court of competent jurisdiction within a state of the United States. The Court further concludes that said custody decree is an "initial decree" as defined in I.C. 31-1-11.6-2(6).

(b) I.C. 31-1-11.6-14 prevents this Court from exercising subject-matter jurisdiction over the merits of petitioner's custody petition because

the initial decree which petitioner seeks to modify was rendered pursuant to jurisdictional prerequisits substantially in accordance with I.C. 31-1-11.6-1 et seq., and the court which made the initial custody determination has not declined to assume continuing jurisdiction to modify the initial decree.

(c) I.C. 31-1-11.6-8(b) is applicable to the facts of this case and this Court is bound not to exercise its jurisdiction to modify the initial decree as a result of petitioner's removal of the child from the physicial custody of respondent without her consent. Pursuant thereto, petitioner should be responsible for respondent's travel and related expenses in the amount of $210.00 and for respondent's attorneys fees in the amount of $2,500.00.

(d) I.C. 31-1-11.6-7 is applicable to the facts of this case and this Court denies jurisdiction over the subject matter of petitioner's custody petition because it is an Inconvenient Forum, resulting from the conclusion that exercise of subject-matter jurisdiction would affront the following purpose of the Uniform Act: I.C. 31-1-11.6-1(3), (4), (5), (6) and (7).

(e) I.C. 31-1-11.6-6 prevents this Court from exercising jurisdiction of this custody petition because the cause of action was commenced while a similar custody proceeding, involving the same child, was pending in Sweden pursuant to jurisdiction substantially in conformity with the Uniform Act as adopted in Indiana, more specifically, I.C. 31-1-11.6-3(a) (1).

3. The relief requested by respondent should be granted by this Court and the Court should enforce the custody decree of February 12, 1979, of the District Court of Gothenborg, Sweden, awarding custody of the child of the parties, Harald Hans-Eric Schleiffer to the respondent.

4. That petitioner's, John Eric Schleiffer, petition for custody and his motion to dismiss Swedish divorce decree should be overruled.

5. That respondent's, Hjordis Beate Schleiffer, petition to deny jurisdiction should be sustained.

IT IS THEREFORE ORDERED AND ADJUDGED BY THE COURT that the petitioner, John Eric Schleiffer, return Harald Hans-Eric Schleiffer to the custody of respondent, Hjordis Schleiffer, within fifteen (15) days of this date or show cause why he should not be held in contempt of Court.

IT IS FURTHER ORDERED BY THE COURT that the petitioner pay to John S. Bloom as attorney fees the sum of $2,500.00 for his services herein, and that petitioner reimburse the respondent in the sum of $210.00 for her traveling expenses within thirty (30) days of this date.

Dated this 1st day of July, 1980.

/s/ Edward J. Meyers
Edward J. Meyers
Judge, Whitley Circuit
Court

MEMORANDUM

STATE OF INDIANA) SS: Edward J. Meyers
WHITLEY COUNTY) Judge, Whitley
Circuit Court

Court Docket:
Civil, Circuit Court No. C-79-47
Criminal, Circuit Court No._____
Probate, Estate No. _____
Probate, Guardianship No. _____
Probate, Trust No. _____
Juvenile Court No. _____

Parties: John Eric Schleiffer vs.
Hjordis Beate Schleiffer

Docket Entry:

Counsel for parties appear. Submitted on petitioner's motion to stay and suspend enforcement of judgment and order and motion to waive appeal bond and suspend judgment pending appeal. Argument of counsel heard. The Court being duly advised in the premises now finds that petitioner, John Eric Schleiffer, should arrange for Harald Hans-Eric Schleiffer to be returned to his mother, Hjordis Beate Schleiffer, in Sweden on or before July 28, 1980 at petitioner costs or to appear in the Whitley Circuit Court on July 29, 1980 at 1:30 P.M. and show cause why he should not be held in contempt for violation of the Court Order.

IT IS THEREFORE ORDERED AND ADJUDGED BY THE COURT that petitioner, Hjordis Beate Schleiffer, [respondent] return Harald Hans-Eric Schleiffer to his mother Hjordis Beate Schleiffer, in Sweden on or before July 28, 1980 at petitioner's costs. IT IS FURTHER ORDERED AND

ADJUDGED that if petitioner fails to return Harald Hans-Eric Schleiffer as herein ordered that he appear at the Whitley Circuit Court on July 29, 1980 at 1:30 P.M. and show cause why he should not be held in contempt of Court and punished therefor. IT IS FURTHER ORDERED that the Court's order of July 1, 1980 be stayed in regard to payment of attorney fees and traveling expenses upon petitioner filing appeal bond with the Court in the amount of $3,000.00 on or before July 28, 1980.

Date of Entry: 7-21-80
Date Mailed: 7-24-80

Copies Mailed to: Ms. C. Darlene Naylor
Mr. William N. Mills
Mr. John S. Bloom

STATE OF INDIANA
Clerk of the Supreme Court
and Court of Appeals

Marjorie H. O'Laughlin, Clerk
217 State House
Indianapolis, IN 46204
Telephone: 232-1930

No. 3-1180A350
John Eric Schleiffer V.
Hjordis Beate Schleiffer

You are hereby notified that the Court of Appeals has on this day denied Petition for Stay of Removal Order. Buchanan, C. J. Denied Motion of Minor Child for Leave to Intervene. Buchanan, C. J. Denied Petition to Reconsider the Denial of the Stay of the Order of the Whitley Circuit Court pending the Determination of this Appeal. Buchanan, Jr., C. J.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 9th day of April 1981

/s/ Marjorie H. O'Laughlin
Clerk Supreme Court and Court of Appeals

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 23, 1981

Before

Hon. Robert A. Sprecher, Circuit Judge

HARALD SCHLEIFFER, a minor by next friend, Ann Ker, Plaintiff-Appellant,	) Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.
No. 80-2240 vs.	)
EDWARD J. MEYERS, as Judge of the Whitley Circuit Court of Whitley County, Indiana, Defendant-Appellee.	) No. 80-C-152) Judge Jesse E. Eschbach

This matter comes before the Court for its consideration upon the "MOTION FOR STAY OF MANDATE" filed herein on April 6, 1981, by counsel for the petitioner-appellant.

This Court's opinion in this appeal concluded,

> Although (plaintiff-appellant's) best interest is for the determination of the Indiana or Swedish courts, we note in passing that the record before us indicates that his interest will be advanced by terminating his proceeding as promptly as possible and allowing the state court to proceed.

Schleiffer v. Meyers, slip opinion at 16 (Seventh Circuit March 16, 1981) (footnote omitted). Counsel for plaintiff-appellant has not filed a petition for rehearing nor has he substantiated his one-page motion by a showing of probable cause to believe that the petition for writ of certiorari, which will be filed, will not be frivolous or filed merely for delay. Accordingly, we see no reason to delay the issuance of this Court's mandate, and IT IS ORDERED that the "MOTION FOR STAY OF MANDATE" is hereby DENIED.

Office-Supreme Court, U.S.
FILED
AUG 15 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-1902

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HARALD SCHLEIFFER, a minor, by next of friend Ann Ker,
Petitioner,

vs

EDWARD J. MEYERS, as Judge of the Whitley Circuit Court, Whitley County, Indiana,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT

JOHN S. BLOOM
111 West Market Street
Columbia City, IN 46725
Phone: (219) 244-5129
Counsel for Respondent

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II
SUMMARY OF ARGUMENT

Harald's Petition for Writ of Certiorari asks the Court to order a state court to hold a hearing on Harald's "best interest" before requiring him to live with his mother in the state of Sweden. In view of Harald's claims that he has rights under the U.S. Constitution not to be ordered to live elsewhere than in the United States, such relief would be absolutely impractical because it would demand a state court to limit the inquiry of Harald's "best interest" to the parent residing in the United States (his father) rather than consider the effect on Harald of living with his mother in Sweden. If Harald has Constitutional rights which he can assert independently of his parents' wishes or the finding of a Court as to his "best interest," such a hearing would necessarily be superfluous.

A minor does not possess an independent right to claim all rights and privileges accorded adults under the United States Constitution, especially when such claims run contrary to a state court's right to adjudicate matters of a familial nature and the existent authority of parent over child. Therefore, Harald does not have a Constitutional right to protest the state court order granting his custody during minority to his mother, regardless of the fact that he may be required thereby to live outside the United States for such period, and he does not have the Constitutional right to independent counsel for the purpose of putting in his "2¢ worth" at a hearing on the issue of his custody.

There is no compelling reason for granting certiorari in this case because there exists no novel question of Constitutional law or any conflict between decisions of different circuits on the subject.

III
ARGUMENT

A. REMEDY REQUESTED BY PETITIONER IS NOT APPROPRIATE

Petitioner seeks redress by Writ of Certiorari to require a state court to determine whether it is in his "best interest" to be removed from the confines of the United States to the custody of his mother in Sweden (Pet. for Writ of Cert., p. 10). In the same breath, Petitioner agrees with the long-standing proposition affirmed by the Seventh Circuit Court of Appeals in this case, that custody and related familial disputes are matters more suitable for determination in State, not federal courts; In Re Burris, 136 U.S. 586, 593-94, (1890).

The argument advanced in the petition to the effect that Harald deserves a hearing in State Court on the issue of his "best interest" before he can be required by color of law to reside outside the United States in itself admits the absence of a judicially

remediable abridgement of his rights under the United States Constitution. The record of this case indicates that the Indiana Court has done nothing more than defer consideration of Harald's "best interest" to the courts of the Kingdom of Sweden pursuant to a presumably valid Indiana statute which itself is not challenged in this proceeding as being Constitutionally deficient (A-3 through A-5; A-53 through A-55). It follows that this request for a hearing for the purpose of determining Harald's "best interest" is contradictory to the demand made in the same paragraph that the federal judiciary require state courts to protect Harald's "Constitutional Rights" (Pet. for Writ of Cert., p. 10). It is the potential dichotomy between the doctrine of "best interest" and the literal application of all the rights guaranteed by our Constitution to minors which Judge Sprecher addresses in his opinion (A-6 through 12).

B. MERITS OF PETITIONER'S CONSTITUTIONAL CLAIMS

Contrary to the relief requested, consideration of the Constitutional claims made by Harald results in a conclusion that they are spurious. He claims both substantive and procedural denials of rights. The claimed denial of his privileges and immunities pursuant to Article IV, Section 2, and the 14th Amendment, Section 1, and the denial of equal protection of the law pursuant to the 14th Amendment, Section 1, are substantive; the claimed denial of due process pursuant to the 5th Amendment and the 14th Amendment, Section 1, and a violation of the proscription against unreasonable seizure pursuant to the 4th Amendment, are procedural.

1. PETITIONER'S SUBSTANTIVE CLAIMS

The United States Supreme Court already has answered Harald's claims that he, a

minor, is being denied his privileges and immunities if he is forcibly removed from the United States during his minority, and that he is being denied equal protection of the law by state action ordering him removed to his mother's custody in Sweden. Petitioner cites In Re Gault, 387 U.S. 1 (1967), (Pet. for Writ of Cert., p. 12), as a general assertion of a juvenile's constitutional protections, but ignores the progeny of that decision. In McKeiver vs. Pennsylvania, 403 U.S. 528 (1971), this Court drew a line distinguishing the rights of adults and juveniles, both procedural and substantive, in its holding that juveniles are not accorded all of the procedural and substantive safeguards of our jury trial system.

Both the District Court and the Seventh Circuit Court of Appeals properly relied upon the holding of this Court in Parham vs. J. R., 422 U.S. 584 (1979) as, stare decises

for holding that Harald cannot complain of the denial of his right to liberty as a result of the state court custody award, either from a substantive or procedural approach (A-15, A-19 & 20, A-32).

2. PETITIONER'S PROCEDURAL CLAIMS

If Harald's claim that he has been denied the opportunity to assert independently certain substantive constitutional rights is spurious, so are his claims of denied procedural due process. Harald is properly only the res of the custody dispute which resulted in this action. It is not for him to determine his "best interest" under the state law and he cannot rightly complain of any lack of opportunity to be heard or represented by counsel at a hearing on the issue. As the record reflects (A-51, 52), the "best interest" hearing in this case took place in Sweden at Harald's father's request while Harald was in his father's custody. Judge

Meyers' decision simply followed Indiana Law requiring deference to that determination of Harald's "best interest" (A-4).

Harald complains that he will be illegally seized as a result of the State Court order. This claim is specious because Harald has no independent right to claim the order granting his mother custody of him is contrary to his Constitutional rights. His claim of denial of 4th Amendment rights cannot stand independently of a right to object to the purpose of the seizure.

C. REASONS FOR DENIAL OF PETITION PURSUANT TO SUPREME COURT RULES

U.S. Sup. Ct. Rule 17(a), U.S.C.A. is relied upon by Petitioner as reason for granting his Petition for Writ of Certiorari. The statements contained in his petition (p-13) do not comply with the rule because there is no conflict between a decision of the Eighth Circuit Court of Appeals and the Seventh Circuit Court of

Appeals. Petitioner would have the Court invoke jurisdiction because of a conflict between decisions of the District Court for North Dakota [Bergstrom vs. Bergstrom, 478 F. Supp. 434 (D.C.N.D. 1979)] and the decision being appealed from the Seventh Circuit. Not only does U.S. Sup. Ct. Rule 17(a), U.S.C.A. not envision such a conflict as being grounds for accepting certiorari, but Judge Sprecher indicates at page 13 of his opinion (A-13) that the district court opinion in Bergstrom vs. Bergstrom, supra, was vacated by the Eighth Circuit Court of Appeals in Bergstrom vs. Bergstrom, 623 F. 434 (8th Cir. 1980).

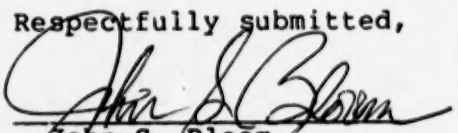
Petitioner also claims that the issues before the Court constitute a question not previously decided by this Court as a reason to grant certiorari pursuant to U.S. Sup. Ct. Rule 17(c). Respondent believes that the discussion of the merits of Petitioner's claims and supporting cases mentioned

previously in this brief adequately dispels the contention that his case is novel.

IV
CONCLUSION

The Petition for Writ of Certiorari should be denied because the opinion of the Seventh Circuit Court of Appeals in the instant case correctly applies the law as previously decided by the United States Supreme Court governing the issues and facts presented in said petition; the petition does not expose a conflict of decisions between the Circuit Courts of Appeal; and the remedy sought by Petitioner is not appropriate relief.

Respectfully submitted,



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NO. 80-1902

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HARALD SCHLEIFFER, a minor, by next of friend Ann Ker,
Petitioner,

vs

EDWARD J. MEYERS, as Judge of the Whitley Circuit Court, Whitley County, Indiana,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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I

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III
REPLY TO SUMMARY OF AGRUMENT

The respondent in his summary of the argument has misstated the minor citizen appellant's position. We have never contended that when and if the state court holds a "best interest" hearing that it must limit its inquiry to matters of favoring the parent residing in the United States. Our position is simply that such a hearing must be held. After such a hearing, the state court may then decide whether it is in the child's best interest to remain in the United States or to be sent to his mother in Sweden. To date, the state court has made no such determination. The state court judge simply found that the state court had no jurisdiction of the matter and ordered the minor citizen petitioner returned to his mother in Sweden.

The minor citizen petitioner's constitutional position is this: That a citizen of the United States may not be removed from the United States against his will. The operative words are, "against his will". For an adult citizen the determination of "will" presents little or no problem. For a minor citizen (particularly one in a custody dispute) the determination is more difficult. In a custody dispute situation, the court must determine the "will" of the child by determining what is in his best interest. The extent to which the court should give weight to the wishes of the child depends upon the age and maturity of the child. If the state court determines that it is in the best interest of the child to be removed from the United States, then such removal would not be against the child's legal "will".

The state court has not yet adjudicated the crucial matter here in issue.

In fact, it dismissed the case for lack of jurisdiction and ordered the minor citizen petitioner returned to Sweden. Where a vital constitutional right is being violated, any citizen, including a minor citizen, has a right to independent legal counsel. Such constitutional rights are worth far more than the "2¢" referred to in the respondent's brief.

IV
ARGUMENT

A. Reply to Remedy Requested by Petitioner is not Appropriate

The U.S. District Court below in its opinion (A-30 to 31) has indirectly held that if there is a violation of the minor citizen appellant's constitutional rights, then the remedy sought would be appropriate. The U.S. District Court held that the petitioner "has steered the murky waters of the Younger doctrine" and met "the threshold requirements" of the Anti-Injunction Act. It should be noted that the petitioner does

not seek an intrusion by the federal courts into matters traditionally reserved to the state courts. He merely seeks to establish a constitutional standard for the state courts. This position is consistent with In Re Burris, 136 U.S. 586 (1890); In Re Gault, 387 U.S. 1 (1967) and other cases establishing constitutional standards for state courts.

The respondent suggests that the state court "has done nothing more than defer consideration of Harald's 'best interest' to the courts of the Kingdom of Sweden . . . ." However, the state court has done no such thing (A-48 to 56). The state court judge merely dismissed the proceeding for lack of jurisdiction. It made no finding on the "best interest" of the minor citizen petitioner. In fact, there is no evidence in the record which shows that the courts of Sweden have made such a determination. It should be noted that

the Swedish courts entered their custody decree after the minor citizen appellant and his father had already left Sweden. The Swedish judgment was essentially one by default, although the father was still represented in Sweden by a power of attorney. More importantly, the constitutional rights and best interest of an American citizen should be determined by American courts and not by Swedish courts.

B. Reply to Respondent's Merits of Petitioner's Constitutional Claim

1. Reply to Appellant's Brief on Substantive Claims

The issue presented to this court is whether a minor child has a right to a hearing before a state court to determine whether he should be removed against his will from the United States. The minor citizen petitioner believes In Re Gault, 387 U.S. 1, (1967) protects this right.

Quite frankly, your petitioner is puzzled by the use of the case of Parham

vs. J. R., 422 U.S. 384 (1979) by the Seventh Circuit Court of Appeals and by the respondent as authority for denying this constitutional right to the petitioner. While that case did not require a judicial hearing before a child could be institutionalized in a Georgia Mental Hospital by a child's parents, it did require that an inquiry be made by an independent neutral fact finder. That case stands for the principal that a child is entitled to due process protections of his constitutional rights. There are no such protections in the petitioner's case.

2. Reply to Respondent's Brief on Petitioner's Procedural Claim

This court has held for more than a century that a person under the laws of the United States (minor or adult) is more than mere property or "res". The petitioner's constitutional rights are at issue. He has a right to be heard in this cause and has a right to have the state

court make a determination of his rights and "best interest" before determining whether he should be removed from the United States. Whether or not the minor citizen petitioner should be represented in the state court proceeding is a subsidiary question and not crucial to the main constitutional matter here at issue. While petitioner believes that he should be represented independently in the state court action, the main issue is whether or not the court must hold a hearing to determine his "will" or "best interest".

For the purposes of this proceeding, the petitioner has a right to bring this cause and to be represented by counsel. This is supported by the decision of the U.S. District Court below (A-29) for the reason that the child was unable to present the constitutional issues in the state court proceeding. It should be noted that the father's appeal to the

Indiana Court of Appeals was dismissed for lack of prosecution. The father was unable to afford the expense of that appeal and that of paying for his son's appeal to this court. This appeal is now the only route by which the petitioner's constitutional rights can be heard and determined by this court.

C. Reply to Respondent's Reasons for Denial of Petition Pursuant to Supreme Court Rules

The respondent claims that there is no conflict between the decision of the Seventh Circuit Court of Appeals below and the Eighth Circuit Court of Appeals in the case of Bergstrom v. Bergstrom, 823 F.434 (8th Cir. 1980). The Bergstrom case in the District Court, Bergstrom v. Bergstrom, 478 F.Supp. 434 (D.C.N.D. 1979), is very much in point and relied upon by the petitioner in this case. Like this case, it was dismissed in the Court of Appeals. However, the dismissal in the Eighth

Circuit was on the grounds that the case was not yet ripe for determination. The Eighth Circuit did not reverse the constitutional holdings of the District Court. Thus, there is a conflict between the two Circuits. There is certainly a conflict between the District Courts of the two Circuits. Further, this case presents an important constitutional issue which should be resolved by this court.

V
CONCLUSION

It is respectfully prayed that this court grant the Petition for Writ of Certiorari and also stay the state court orders pending this appeal.

Respectfully submitted,

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